Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

THE NATIONALIST MOVEMENT,
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

On Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Is the "Methodology Test" of *Rev. Proc.* 86-43, 1986-2 C.B. 729, which allows Internal Revenue regulators to deny tax-exemption to charitable and educational organizations based upon the content of the organization's speech, unconstitutionally vague or overbroad, or lacking in narrowly-drawn, carefully-tailored standards, on its face or as applied, in violation of free speech guarantees (as well as due process and equal protection protections) of the First and Fourteenth Amendments?

2. Is it clear error to deny tax-exemption to an organization, which conducts litigation in defense of the First Amendment, on the grounds that, since the organization is the "party in interest" in the majority of such litigation, the benefit to the general public is only collateral and, therefore, the activity is not charitable and tax-exempt?

3. Is it clear error to hold that social service counselling, which meets all the statutory criteria, is not charitable or that conduct of such activities defeats charitable status altogether?

PARTIES BELOW

The Nationalist Movement

Commissioner of Internal Revenue

CASES BELOW

The original case was *The Nationalist Movement v. Commissioner of Internal Revenue,* 102 T.C. 558 (1994). The case on appeal, below, is *The Nationalist Movement v. Commissioner of Internal Revenue*, 37 F.3d 216 (5th Cir. 1994).

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PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

Petitioner, The Nationalist Movement, prays that a Writ of Certiorari issue to review the judgment of the Fifth Circuit Court of Appeals in this matter.

OPINION BELOW

The ruling of the Fifth Circuit Court of Appeals from which certiorari is sought is contained in the case styled *The Nationalist Movement v. Commissioner of Internal Revenue*, at the Appendix, dated November 7, 1994, which declined to consider the contention that the Methodology Test used to evaluate Petitioner's educational activities is unconstitutional. The Court

held, *inter alia*, that since Petitioner was the "interested party in the majority of its litigation" conducted in defense of the First Amendment, that such litigation only collaterally benefited the general public and, therefore, the activity was not tax-exempt. The burden of proof was, also, said to not be carried that Petitioner's social service counselling is charitable.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 *USC* §1254(1).

RELEVANT STATUTORY PROVISIONS

The First Amendment, which reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment, §1, which reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

26 *USC* §501(c)(3), which reads:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious,

charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Rev. Proc. 86-43, 1986-2 C.B. 729, which reads:

.01 The Service recognizes that the advocacy of particular viewpoints or positions may serve an educational purpose even if the viewpoints or positions being advocated are unpopular or are not generally accepted.

.02 Although the Service renders no judgment as to the viewpoint or position of the organization, the Service will look to the method used by the organization to develop and present its views. The method used by the organization will not be considered educational if it fails to provide a factual foundation for the viewpoint or position being advocated, or if it fails to provide a development from the relevant facts that would materially aid a listener or reader in a learning process.

.03 The presence of any of the following factors in the presentation made by an organization is indicative that the method used by the organization to advocate its viewpoints or positions is not educational.

1. The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization's communications.

2. The facts that purport to support the viewpoints

or positions are distorted.

3. The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.

4. The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.

.04 There may be exceptional circumstances, however, where an organization's advocacy may be educational even if one or more of the factors listed in section 3.03 are present. The Service will look to all the facts and circumstances to determine whether an organization may be considered educational despite the presence of one or more of such factors.

SUMMARY OF THE ARGUMENT

This is a case of first impression, not decided by any Circuit Court, to date. The regulation, by which administrators can deny tax-exemption, fails constitutional muster because of its potential for abuse in limiting free expression. While the trial court ruled that the challenged Methodology Test is constitutional, the Appeals' Court declined to consider the constitutional issue; however, it is incumbent that there be such consideration, where, as here, the First Amendment is impacted.

The Methodology Test is vague and overbroad and susceptible to unreasonable, arbitrary and capricious application. It is not narrowly drawn, with reasonable and definite standards, to guide officials in its administration. The regulators, without restraint or guidelines, are permitted to determine: What is the

"factual foundation" for expression? What is the "development" of such expression? What are "facts," as advanced by the organization? And, moreover, what are "relevant" facts? The regulators are given authority to decide what are "communications" under expressive activity and to scrutinize any such communications for "distorted facts," "inflammatory" or "disparaging" language, as well as for "conclusions" which include "strong emotional feelings". The regulators may, also, determine what comprises a "substantial" part of the organization's expressions and whether the organization's "methodology" is sufficiently "objective." The regulator determines whether the organization is "developing an understanding" in behalf of its audience and if the "background or training" of those toward whom the organization's expression is directed is sufficiently "considered" by the organization.

Particularly suspect is the "escape clause" which allows the regulator to disregard its own procedures based upon unstated "exceptional circumstances" when "one or more" or its methodology factors is otherwise present.

The holding, below, that litigation in defense of the First Amendment only collaterally benefits the general public and, therefore, does not entitle the activity to be designated as charitable for purposes of tax-exemption is not based upon any authority cited by the Appeals' Court or the trial court. Although no case has apparently been decided by this Court on the same facts, the holding would appear to be clearly erroneous in that this Court has approved the "private attorney general" theory, that litigation to vindicate civil rights' is considered to be in the public interest. Respondent's own regulations provide for tax-exemption for organizations that defend civil rights. There is also indication that Petitioner is not treated equally to other organizations similarly situated.

Petitioner's social service activities, consisting primarily of

telephone counselling to the poor and disadvantaged, squarely meet all of the statutory tests for tax-exemption. They are operated *exclusively* for *charitable* purposes, no earnings benefit any member or official and the service does not influence legislation or a political campaign.

STATEMENT OF THE CASE

On December 5, 1987, Petitioner, a Mississippi non-profit corporation, applied for tax-exemption as a charitable and educational organization, pursuant to §501(c)(3) of the *Internal Revenue Code (1986)*. On March 27, 1991, Respondent denied the exemption based, *inter alia,* upon a finding that Petitioner did not qualify under *Rev.Proc.* 86-43, 1986-2, C.B. 729. On May 29, 1991, Petitioner brought a Petition for Declaratory Judgment in the United States Tax Court under Rule 211, *Tax Court Rules*, §7428 *Internal Revenue Code (1986),* and the First, Fifth and Fourteenth Amendments, seeking declaratory relief that *Rev. Proc.* 86-43, 1986-2, C.B. 729 (also known as the Methodology Test) was unconstitutional, on its face or as applied, and requesting that tax-exemption be granted. In its answer, Respondent alleged that the Tax Court was without jurisdiction to consider the constitutional issues raised by Petitioner. The contention was overruled by the Court.

On April 11, 1994, the Tax Court ruled that the challenged Revenue Procedure was constitutional, that Petitioner had not carried its burden of proof that its social counselling, legal services and publication were charitable or educational and that Petitioner's litigation in defense of the First Amendment was not charitable in that Petitioner's litigation was of only incidental benefit to the general public. The case was appealed on April 20, 1994. On November 7, 1994, the Fifth Circuit Court of Appeals, without hearing oral argument, declined to consider the constitutionality of the Methodology Test but otherwise affirmed the ruling of the Tax Court that Petitioner's

activities were substantially "not for the benefit of the public." The Court held, *inter alia,* that since Petitioner was the "party in interest in the majority of litigation" it conducted in defense of the First Amendment, that "the primary purpose of the litigation was to advance the interests" of Petitioner and, therefore, was not charitable in nature.

STATEMENT OF THE FACTS

Petitioner is a non-profit organization incorporated for charitable and educational purposes. No financial benefit accrues to any member or official. A "pro-majority" agenda is promoted favoring democracy, majority rule and American nationality, including calling for voting by national initiative and referenda. Activities include social service counselling for the poor and disadvantaged, conducting litigation in defense of the First Amendment, operating a television network which features interviews and documentaries, publishing a newspaper of news and views which includes a disclaimer that views expressed are not necessarily those of the publisher, publishes pamphlets, studies and polls and carries on parades, petitions and public forums. Some of the views expressed by Petitioner have been controversial.

Respondent raised numerous challenges against Petitioner's tax-exemption application in the administrative processes, such as that Petitioner's ideas and membership policies violated public policy, which Respondent abandoned, or that Petitioner served a private rather than public purpose, which was rejected by the trial court. Respondent relied heavily throughout, however, upon its "Methodology Test," which purports to permit it broad authority to consider the content of Petitioner's expression and to deny tax-exemption based upon its evaluation of such speech.

REASONS FOR GRANTING THE PETITION

PROPOSITION I

THE "METHODOLOGY TEST" OF *REV. PROC.* 86-43, 1986-2 C.B. 729, WHICH ALLOWS INTERNAL REVENUE REGULATORS TO DENY TAX-EXEMPTION TO CHARITABLE AND EDUCATIONAL ORGANIZATIONS BASED UPON THE CONTENT OF THE ORGANIZATION'S SPEECH, IS UNCONSTITUTIONALLY VAGUE OR OVERBROAD, OR LACKING IN NARROWLY-DRAWN, CAREFULLY-TAILORED STANDARDS, ON ITS FACE OR AS APPLIED, IN VIOLATION OF FREE SPEECH GUARANTEES (AS WELL AS DUE PROCESS AND EQUAL PROTECTION PROTECTIONS) OF THE FIRST AND FOURTEENTH AMENDMENTS.

The challenged Revenue Procedure was promulgated in response to its predecessor's having been struck down as unconstitutional, *Big Mama Rag, Inc. v. United States,* 631 F.2d 1030 (D.C.Cir.1980).[1] But the ruling has not been tested by any circuit court or in this Court. The Appeals' Court, in error, concluded that it was not necessary to reach the constitutional issue;[2] this would be in accord with general principles of

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[1] See also *The Nationalist Movement v. Commissioner of Internal Revenue,* 37 F.3d 216 (5th Cir.1994), n. 2 "([t]he constitutionality of this test has not been decided by any circuit").

[2] The conduct of the regulator is relevant in the administration of the challenged measure, *Forsyth County, Georgia v. The Nationalist Movement* 505 U.S. ___ (1992). The record of the case, particularly the original administrative record, contains significant details in that regard. In addition, Respondent would seem to have disregarded, in part, its own regulations which provide that organizations which "defend human and civil rights secured by law" are charitable, see 26 *C.F.R.* §1.501(c)(3)-1(d)(2) [cited in

statutory construction that a measure is generally presumed to be valid. However, where a regulation, as here, is challenged as overbroad and potentially chilling upon First Amendment[3] rights, a facial challenge lies, see *e.g. Forsyth County, Georgia v. The Nationalist Movement,* 505 U.S. ___ (1992). *See also NAACP v. Button,* 371 U.S. 415, 438 (1963) (for the compelling governmental interest rationale when a fundamental right is impacted). The test is not necessarily whether the regulation's "purpose or effect" is to permit arbitrary conduct impermissibly restricting expression, but whether the measure has the potential for such abuse, *Smith v. Goguen,* 415 U.S. 566 (1974).[4]

The Respondent's Methodology Test might be, also, called the Shylock Test. But instead of saying, "You can have your pound of flesh, just don't take any blood along with it," Respondent is saying, "You can have your free expression, just

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the Appeals' Court's decision, *The Nationalist Movement,* 37 F.3d at 220, n. 4].

[3] A facial challenge, as here, includes claims to both First Amendment guarantees and Fourteenth Amendment guarantees of due process and equal protection.

[4] The Tax Court said:

> [W]e cannot avoid ... considering the constitutionality of the revenue procedure's methodology test as applied by respondent to petitioner.... Petitioner [however] has not persuaded us that either the purpose or the effect of the revenue procedure is to suppress disfavored ideas.

The Nationalist Movement v. Commissioner of Internal Revenue, 102 T.C. 558, 583, 589 (1994). See *e.g.* Administrative Record, Ex. 6-F, p. 5 for Respondent's imposition of the Methodology Test.

don't propagate your views along with it."[5]

Respondent must necessarily consider the content of the expression,[6] *see e.g. Freedman v. Maryland,* 380 U.S. 51 (1965) (for the prohibition against considering content of expression) and *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221 (1987), which creates a risk of prior restraint, *see also Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963) (as to the heavy presumption against prior restraints). The Methodology Test simply, but intolerably, permits the Government to discriminate on the basis of the content of expression, *see Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984) (prohibiting content discrimination).

The challenged regulation is so broad (it even has an "exceptional circumstances" provision which allows Respondent complete, unfettered discretion in granting or denying tax-exemption as it sees fit) that virtually any expression can be banned, penalized or taxed. For instance, a pro-police organization publishing a pamphlet saying: "We must get the thugs off our streets" might be granted the exemption, but a pro-nationalist organization publishing a tract which says: "We must keep the thugs from coming over our borders" might not. Respondent, alone and unfettered, would have decided what is

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[5] What would be the point of having views without being able to propagate them? By analogy, it has been held that circulation is essential to liberty of publishing under the First Amendment, *Ex Parte Jackson*, 96 U.S. 727, 733 (1878).

[6] Consideration of content would seemingly and necessarily be part of any analysis of what are "facts," "inflammatory" words, "objective" words, "conclusions," "disparaging" words, the "learning process", "relevant" facts and "development" of a "factual foundation."

"inflammatory"[7] and what is not, or what has promulgated sufficient "facts" and what has not.

Because the regulation is so overbroad, vague and unclear, it does not afford sufficient, narrowly tailored guidelines[8] to administrators, but, moreover, one seeking to comply with its provisions is left at a loss. Does a "factual foundation" require that each expression, say, in Petitioner's newspaper, have to be footnoted, the same as a legal brief? Would it be sufficient to quote some source? Would the source need to be a member of the academic community or would a newspaper reporter suffice? Could a matter of common knowledge, such as that of which courts take judicial notice, be expressed without penalty or not? It would seemingly require almost a declaratory judgment, in itself, in order to determine what can be expressed or how.[9]

It is not that Respondent does not have a legitimate interest in collecting taxes and, even, in prohibiting "propaganda" from

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[7] Respondent, according to its regulation, may differentiate between expression which is based on "strong" emotion versus expression based on, apparently, just regular emotion, whatever that might mean.

[8] *See e.g. Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. ___ (1992) and *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) (for the "carefully tailored" test). See Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 *U.Pa.L.Rev.* 67 (1960) (for the void-for-vagueness doctrine); see also *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (for the overbreadth doctrine) and 16A *Am.Jur.2d* Constitutional Law §459-463 (discussion of the vagueness and overbreadth doctrines).

[9] Respondent's attempts, if any, to require educational and charitable organizations to operate in a kind of "academia," are misplaced. An academic setting usually increases, rather than decreases, the climate for free expression, *cf Keyshian v. Board of Regents*, 385 U.S. 589, 603, 605-606 (1967).

being carried on, contrary to statute.[10] But the Methodology Test simply goes too far and serves no compelling governmental interest. Also, it tends to treat those similarly situated unequally based solely upon the content of their expression, *see e.g. Widmar v. Vincent*, 454 U.S. 263 (1981) (disparate treatment based upon content of expression prohibited). *See also Lindsey v. Normet*, 405 U.S. 56 (1972) (decision-makers cannot treat persons differently who are in all relevant respects alike).

Congress has mandated that *bona fide* charitable[11] or educational organizations be exempt from taxation. It would seem that a charitable or educational organization serving the public good[12], as here, might be tested, if need be, through more content-neutral criteria, where the First Amendment impacts, such as by inquiring, if at all,[13] Is discussion[14] promoted?

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[10] The proscription of 26 *USC* §501(c)(3) seems to be related to preventing "propaganda" which unduly influences legislation, however.

[11] As the opinion, below, noted, Petitioner is organized primarily for charitable purposes and secondarily for educational purposes. *The Nationalist Movement*, 37 F.3d at 217.

[12] The test for charitable organizations in the public interest is set out generally in *Perrin v. Carey*, 24 U.S. 465, 505 (1861) (to suppress vice, advance public health and order or promote trade, industry and happiness).

Education is generally defined as "the whole course of training, moral, intellectual, and physical. Education may be directed either to the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all.... Acquisition of all knowledge tending to train and develop the individual." To educate is to "prepare ... for any calling ... or for any activity and usefulness in life." *Black's Law Dictionary*, Rev'd 4th Ed. (1986), 604.

[13] These are analogies drawn by Petitioner, not by the courts on the exact facts at hand; however, general principles that would seem to comprise "education" and "free speech" are applied.

Is expression[15] and communication[16] advanced? Is comment on matters of public concern[17] enhanced? Is opportunity for discussion of public issues[18] furthered? Is information disseminated?[19] Is the uninhibited marketplace of ideas[20] carried on? Is there liberty of discussion?[21] And, perhaps most important, Is there freedom from restraint and taxation?[22]

Congress intends for Respondent to be the Tax Collector, not ombudsman of language. Respondent should not be permitted to deny tax-exemption[23], beyond the authority granted by Congress, to those who express what he may feel are "dangerous" ideas or who profess views with which he may (actually or potentially) disagree, *see e.g. Speiser v. Randall,* 357 U.S.

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[14] See *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 (1988).

[15] See *City of Lakewood*, 486 U.S. at 760.

[16] See *City of Lakewood*, 486 U.S. at 763.

[17] See *City of Lakewood*, 486 U.S. at 757.

[18] See *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94, 131 (1973).

[19] See *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

[20] See *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969).

[21] See *Carlson v. People of the State of California,* 310 U.S. 106 (1940). Note that Petitioner includes disclaimers in its newspaper and television programs that views expressed are not necessarily those of Petitioner.

[22] See *Grosjean v. American Press Co.*, 297 U.S. 233, 246-249 (1936).

[23] The power to tax being the power to destroy.

513 (1958)[24] (denying exemption for "dangerous ideas" an impermissible limitation upon free speech); *see also Regan v. Taxation With Representation,* 461 U.S. 540 (1983).

PROPOSITION II

IT IS CLEAR ERROR TO DENY TAX-EXEMPTION TO AN ORGANIZATION WHICH CONDUCTS LITIGATION IN DEFENSE OF THE FIRST AMENDMENT ON THE GROUNDS THAT, SINCE THE ORGANIZATION IS THE "PARTY IN INTEREST" IN THE MAJORITY OF SUCH LITIGATION, THE BENEFIT TO THE GENERAL PUBLIC IS ONLY COLLATERAL AND, THEREFORE, THE ACTIVITY IS NOT CHARITABLE AND TAX-EXEMPT.

The Appeals' Court cites no authority for its holding that since Petitioner is the "party in interest," its litigation in defense of the First Amendment is only of collateral benefit to the pub-

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[24] Both Respondent, in its administrative proceedings, and the Tax Court, in its ruling, quoted extensively from Petitioner's publications and Doctrine. Quoting from the Tax Court's ruling:

> Petitioner's pro-majority philosophy is intended to counteract minority "tyranny", which supposedly takes the form of special favors and privileges for minority groups, such as hiring quotas and affirmative action. For most of its existence, petitioner has strongly advocated repeal of the Civil Rights Act and the Voting Rights Act.

The Nationalist Movement, 102 T.C. at 560-561.

The Tax Court scored Petitioner for what it termed "unflattering references to black people" as indicated by "[f]or example, the March 1988 issue [of Petitioner's publication] contained an apparent first-person account of a white prison inmate, who lamented the high incidence of homosexuality and AIDS among nonwhite inmates...." *The Nationalist Movement,* 102 T.C. at 566.

lic and, therefore, is not of benefit to the general public[25] so as to be classified as "charitable"[26] for purposes of the granting of tax-exemption.

Litigation in behalf of the First Amendment is an important part of Petitioner's activity,[27] conducted under 42 *USC* §§1983,

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[25] The Court's ruling has some inconsistency, however. Although it concludes that there is no benefit to the public because Petitioner is the "party in interest" to First Amendment litigation, it cites four tests for tax-exemption, the fourth if which is that organizations "seeking exemption from taxes must serve a valid public purpose and confer a public benefit." The Court specifies that "[o]nly the first element is in contention in this appeal" [rather than the fourth element dealing with public benefit. The first element tests whether the organization primarily engages in exempt activities]. But the Court, also, notes that "to defend human and civil rights secured by law" is a valid exempt activity. *The Nationalist Movement*, 37 F.3d at 220, and n. 4.

Seemingly, since the Appeals' Court specifies in its analysis that the fact is not challenged that Petitioner serves a valid purpose and confers a public benefit by its activities, the holding that is somewhat at odds with the analysis. The holding piggybacks the finding that Petitioner's litigation is not charitable upon the premise that since such work comprises 20% of Petitioner's activities, a substantial part of Petitioner's activities is not charitable. The trial court held that the additional 25% of Petitioner's activities which involve social service work had not carried the burden of showing exemption because of insufficient information submitted on the subject, rather than the same not serving a valid purpose or benefiting the public. Adding the 20% legal to the 25% social service comprised a 45% "substantial" non-charitable activity, the Court below held.

[26] A charitable organization is defined simply as one that "freely and voluntarily ministers to the physical needs of those pecuniarily unable to help themselves.... One organized for the purpose, among other things, of promoting the welfare of mankind at large, or of a community, or of some class...." *Black's Law Dictionary* Rev'd 4th Ed. (1968), 296.

[27] The trial court noted that

1985, the Civil Rights' Acts.[28]

> Petitioner's legal defense fund is itself a relatively important activity in terms of staff time. Emphasizing First Amendment issues, the legal defense fund supports petitioner and its individual members.... Legal services are also available to the public, especially the poor.
>
> ...
>
> [P]etitioner's legal work, which emphasizes constitutional issues, has been an ongoing and important activity throughout petitioner's corporate existence. Moreover, petitioner provides free legal assistance on occasion to the poor, and relief of the poor is considered a charitable purpose. Sec. 1.50(c)(3)-1(d)(2), Income Tax Regs.; see Rev. Rul. 78-428, 1978-2 C.B. 177.
>
> In most of the litigation undertaken, however, petitioner itself, rather than an individual, has been the party in interest. In essence, petitioner has often engaged in litigation to protect its own interests, though such litigation may have broader implications.

The Nationalist Movement, 102 T.C. at 569, 578.

[28] A sampling of such cases includes:

(a) *The Nationalist Movement v. City of Boston,* No. 94-10825 RWZ (D.C..Mass.1994), (right to parade) (Petitioner as Plaintiff) (case pending);

(b) *The Nationalist Movement v. City of Vidor, Texas,* No. 93-5459 (5th Cir.1994) (right to parade) (Petitioner as one of multiple plaintiffs) (case pending);

(c) *The Nationalist Movement v. City of Cumming, Georgia,* No. 2:89-CV-00006 WCO (D.C.N.D.Ga.1989) (right to parade) (Petitioner as Plaintiff) (case pending);

(d) *Horton v. City of Houston, Texas,* No. H-92-3451 (D.C.S.D.Tex.-1992) (right to broadcast on public access television) (Petitioner as one of multiple plaintiffs) (case pending);

(e) *Forsyth County, Georgia v. The Nationalist Movement,* 505 U.S.

It would seem that this Court has indicated that the public benefits from civil rights' litigation, without qualification. In fact, it has been said that Congress considers vindicating civil rights to be of the highest priority, *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1967). Under the Appeals' Court's rationale, however, it would further seem that redress for civil rights could be somewhat whittled away, by suggesting that the public does not benefit if an "interested party" brings the civil rights' lawsuit. Such a shift in time-honored practice and policy would reverse not only the policy of this Court but public policy.

An analogy may be drawn to the pronouncement of this Court that

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only.

___ (1994) (right speak in public forum without payment of fees) (Petitioner as Plaintiff) (Petitioner prevailed);

(f) *Forest Hill Spirit Boosters v. Jackson Public School District*, No. J90-0264(L) (D.C.S.D.Miss.1990) (right to use public facilities for free speech activities) (Petitioner not a party) (Petitioner's counsel prevailed);

(g) *Forsyth County Defense League v. City of Cumming, Georgia*, No. 87-31G (D.C.N.D.Ga.1987) (right to assemble at seat of government for free speech activities) (Affiliate of Petitioner as one of multiple parties) (Affiliate prevailed);

(h) *The Nationalist Movement v. City of Natchez, Mississippi*, No. W88-0033(B) (D.C.W.D.Miss.1988) (right to parade and right of poor to sue without pre-payment of court costs) (Petitioner as Plaintiff) (Petitioner prevailed);

> When a plaintiff brings an action under that Title, he ... does so *not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.*

Newman, 390 U.S. at 401-402 [emphasis added]. Legislative history, also, underscores Congressional intent that civil rights' litigation benefits the public:

> Enforcement of the [civil rights'] laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement becomes too great, there will be no private enforcement.

S.Rep. No. 94-1011, 94th Cong., 2d Sess. 4, reprinted in *U.S. Code Cong. & Admin. News* 5908, 5913 (1976). The Senate Report also states that civil rights should not be "mere hollow pronouncements which the average citizen cannot enforce", *Id.*

Petitioner is not the only organization that carries on civil rights' litigation and, at the same time, has a point of view. While many may come to mind, one such organization is the NAACP Legal Defense and Educational Fund, Inc., a tax-exempt organization.[29] The organization was, for instance, a party[30] to *NAACP v. Button,* 371 U.S. 415, 417 (1963) which

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[29] According to the *Cumulative List of Organizations Described in §170(c) of the Internal Revenue Code of 1986,* Rev'd to October 31, 1988, Dept. of the Treasury, IRS, Publ. #78 (Rev. 1-89), Supt. of Documents, U.S. Government Printing Office, Washington DC.

[30] The organization has not only acted as a party, or as a "party in interest," as the case may be, but its counsel argues cases in this Court. For example, Theodore M. Shaw, counsel for the NAACP Legal Defense and Educational Fund, Inc., argued the Missouri school integration case here on January 11, 1995, reported in *Clarion-Ledger,* Jackson, Mississippi, January 12, 1995, p. 7-A, col. 1.

dealt with redressing civil rights.[31]

Given such strong public policy considerations, of such long-standing, that civil rights' litigation is beneficial to the public, that it needs public involvement in order to succeed and that such litigation should be encouraged, the decision below denying tax-exemption for the carrying on of civil rights' litigation on the grounds that the organization did not bring the litigation in behalf of some party other than itself[32] is clearly

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[31] Petitioner alleged, as part of its claim for abridgement of Fourteenth Amendment rights, that it was treated dissimilarly to organizations similarly situated in violation of Equal Protection. In support of this contention, *inter alia,* Petitioner cited the said *Cumulative List of Organizations* to show that no organization using the term "white" as an expressive *animus* had been granted tax-exemption, but that organizations using "African," "Black," "Hispanic", "Jewish" and "Gay" had been. *Big Mama Rag,* in fact, in which Respondent's prior but similar "methodology" rule was struck down as unconstitutional, allowed tax-exemption to a lesbian organization. The trial court rejected Petitioner's equal protection argument; the Appeals' Court did not consider it. However, Petitioner preserves its contention.

For instance, a facial challenge to a regulation, as here, may take into account the regulator's conduct under the regulation, see *Forsyth County,* 505 U.S. ___ (1992), as part of deliberation on how the measure is applied. The fact that no organization with an *animus* similar to Petitioner has been granted tax-exemption (if there was one, Respondent would have likely produced it or cited to it) does not seem to bolster Respondent's position.

[32] Respondent, in the administrative process, based its denial of tax-exemption, *inter alia,* upon the grounds that Petitioner's "ideas" and "membership policies" are "invidiously discriminatory" and "contrary to public policy." Respondent abandoned such a claim and did not argue it in the trial court, *see The Nationalist Movement,* 102 T.C. at 571 (detailing the abandonment of Respondent's allegations). Respondent also abandoned its stance during administrative proceedings that Petitioner was a political "action" organization. Respondent did claim, in the Tax Court, that Petitioner "served a private purpose," as opposed to a public purpose, which was specifically rejected by the trial court. *The Nationalist Movement,* 102 T.C.

erroneous and contrary to public policy.

PROPOSITION III

IT IS CLEAR ERROR TO HOLD THAT SOCIAL SERVICE COUNSELING, WHICH MEETS ALL THE STATUTORY CRITERIA, IS NOT CHARITABLE OR THAT CONDUCT OF SUCH ACTIVITY DEFEATS CHARITABLE STATUS ALTOGETHER

If Petitioner's social service activities are not charitable, what are they? Such services, consisting of telephone counseling as a "clearing house" for problems of the poor and disadvantaged, is promoted by means of telephone directory advertising and is manned primarily by practicing legal counsel. Approximately 25% of Petitioner's time is expended on such services.

All of the statutory tests of 26 *USC* §501(c)(3) are met. The service is exclusively for counselling. It is entirely charitable. No earnings benefit any individual. No litigation is influenced. And there is no involvement in any political campaigns.

The Appeals' Court was clearly in error in designating such activities as non-charitable.[33] In any event, alternatively, should Petitioner be otherwise charitable, the providing of social

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at 574-575.

[33] The Appeals' Court laid considerable stress on one report that Petitioner fielded some thirty calls a month versus another report stating that some one hundred calls were fielded, calling the reports "inconsistent." The distinction would not seem to be all that considerable or fatal to charitable status. Apparently, some one hundred calls were received but some thirty were actually acted upon. The matter, if need be, could have been (or could still be, if necessary) clarified by a remand. A remand, however, would not appear to be necessary.

service counseling in an amount of 25% of time expended would not appear to be a "substantial" activity, in terms of time, nor, more likely, substantial at all compared to the overall impact or extent of Petitioner's activities.[34]

CONCLUSION

To prevent a chilling effect upon freedom of expression upon charitable and educational organizations, the Court would advance the public good and protect First Amendment rights by invalidating *Rev.Proc.* 86-43, 1986-2 C.B. 729. The facts at hand are novel but significant. The case is important because of the enormous potential for abuse represented by the challenged measure, on its face, or as applied. Where, as here, government regulators are given too wide a latitude in interpreting or implementing a given measure, a *bona fide* charitable and educational organization may be subjected to arbitrary, capricious and unconstitutional conduct based solely upon the content of its speech. Such arbitrariness, or the potential for such a result, is a violation of the First and Fourteenth Amendments. Congress and this Court have underscored that civil rights' litigation, initiated under the "private attorney general" theory, benefits the general public. Insofar as Petitioner redresses violations of constitutional rights, in the public interest, it should be encouraged, not penalized.[35]

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[34] For instance, even if 25% of time were expended on social service counseling, the 20% of time expended in arguing First Amendment cases before this Court and otherwise would tend to have a possibly greater impact upon the lives and liberties of the American People, as a whole, and, consequently, be the more (or even "the most") "substantial".

[35] Determining, in addition, whether Petitioner has "carried the burden" of its social service counseling being charitable may not be of overwhelming magnitude, standing alone. However, in the context of the totality of the litigation, the point could be of particular importance by allowing this Court

For all of the reasons hereinbefore set forth, Petitioner respectfully requests that the Writ of Certiorari be issued.

Respectfully submitted this the 14th Day of January, 1995.

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the opportunity to give complete relief, in this case, and, also, to provide any needed guidance to courts dealing in the future with defining charitable activities, in general.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

The NATIONALIST MOVEMENT,
A Mississippi Non-Profit Corporation,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

No. 94-40389

Nov. 7, 1994

Appeal from a Decision of the United States Tax Court.

Before Duhe, Wiener and Stewart, Circuit Judges.

PER CURIAM:

Appellant, The Nationalist Movement, a Mississippi non-profit corporation, appeals from judgment entered by the United States Tax Court denying tax exempt status under I.R.C. §501(c)(3). We affirm.

I. FACTS

Appellant is a non-profit organization which promotes a "pro-majority" agenda, favoring democracy, majority-rule and American nationality. Appellant claims to conduct various social service programs for the poor and disadvantaged. These services allegedly consist of "counseling" services and First Amendment litigation. In addition, Appellant publishes pamph-

lets, brochures, studies, polls and a newspaper. Appellant claims tax exemption as a corporation organized primarily for charitable purposes and secondarily for educational purposes.

Appellant applied to the Internal Revenue Service (IRS or Commissioner) for 501(c)(3) exemption in December 1987. After some discussion and correspondence between the parties, the IRS issued a final adverse ruling stating.

> Your activities demonstrate that you are not operated exclusively for exempt charitable or educational purposes as required by section 501(c)(3). Furthermore, you are operated in furtherance of a substantially non-exempt private purpose.

In 1991 Appellant filed a declaratory judgment action in the United States Tax Court, appealing the Commissioner's decision.[1]

Appellant sought relief on various grounds including, *inter alia,* that the Commissioner erred in his determination that Appellant is not operated exclusively for exempt charitable and educational purposes and that certain IRS regulations were unconstitutional on their face or as applied.[2] During the course

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[1] *See* I.R.C. §7428(a).

[2] Specifically, Appellant challenges Rev.Proc. 86-43, 1986-2 C.B. 729 which sets out the "methodology test." The IRS uses the methodology test to determine "when advocacy of a particular viewpoint or position by an organization is considered educational within the meaning of section 501(c)(3) of the Internal Revenue Code, and within the meaning of section 1.501(c)(3)-1(d)(3) of the Income Tax Regulations." Rev.Proc. 86-43, 1986-2 C.B. 729 at §1.

The D.C. Circuit, in *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C.Cir.1980) found 26 C.F.R. §1.501(c)(3)-1(d)(3) to be unconstitutionally vague. Rev.Proc. 86-43 attempts to reduce the vagueness in the

of the Tax Court proceedings, Appellant filed a Motion To Compel Discovery and a Motion Under Tax Court Rule 217 to supplement the administrative record. The Tax Court denied both motions because its review was limited to the administrative record, and entered declaratory judgment for Appellee.

Appellant appeals the holding of the Tax Court on several grounds. First, Appellant claims that the court erred in refusing to allow additional discovery and by refusing to allow supplementation of the administrative record. Second, Appellant claims that the court erred in finding that its legal and counseling services are not charitable. Finally, Appellant claims that certain revenue procedures, on their face or as applied, violate "due process and equal protection under the First, Fifth and Fourteenth Amendments." Because we find that the Tax Court correctly decided the first two issues, we need not address the constitutionality of the revenue procedures.

II. DISCOVERY ISSUES

Tax Court Rule 217(a) provides that "[o]nly with the permission of the Court, upon good cause shown, will any party be permitted to introduce before the Court any evidence other than that presented before the Internal Revenue Service and contained in the administrative record as so defined." We review the decision of the Tax Court to exclude additional evidence under an abuse of discretion standard. *See Tamko Asphalt Prod., Inc. v. Commissioner,* 658 F.2d 735, 738-39 (10th Cir.1981).

Appellant attempted to supplement the administrative

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application of §1.501(c)(3)-1(d)(3). The constitutionality of this test has not been decided by any circuit. However, the D.C. Circuit discussed the test with approval in *National Alliance v. United States,* 710 F.2d 868 (D.C.Cir.1983).

record by two methods. First, Appellant requested discovery from the IRS which it claimed would show disparate application of the Tax Code. Second, Appellant attempted to attach a "Brandeis Brief" in support of its constitutional claims. Appellant's only arguments as to "good cause" center around its claims that the information was necessary to receive a "fair trial." The Tax Court denied both motions because Appellant failed to show good cause why the information could not have been submitted during the administrative process.

We find no abuse of discretion in the Tax Court's holding. The purpose of the declaratory judgment action under I.R.C. §7428 is to review the Commissioner's decision. Section 7428 does not provide for a trial *de novo*. "To allow the party seeking [declaratory judgment] to freely bring new evidence before the Tax Court would amount to a bypass of the Service's administrative remedies since the Tax Court would be considering factual contentions the IRS had no opportunity to consider." *Tamko Asphalt Prod., Inc. v. Commissioner*, 658 F.2d at 739. The Appellant had the burden of establishing its entitlement to exemption during the administrative process. *See Senior Citizens Stores, Inc. v. United States*, 602 F.2d 711, 713 (5th Cir.1979). Failure to carry this burden may not be remedied by disregarding the statutory scheme established by Congress.

III. EXEMPTION ANALYSIS

A. Standard of Review

Title 26, section 7482(a)(1) provides that "The United States Courts of Appeals ... shall have exclusive jurisdiction to review the decisions of the Tax Court ... in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury...." Thus, we review findings of fact for clear error and legal conclusions *de novo*. *Estate of Clayton v. Commissioner*, 976 F.2d 1486, 1490 (5th Cir.1992). Our review is limited to the record before the Tax Court, and new

evidence may not be submitted on appeal. *See Hintz v. Commissioner,* 712 F.2d 281, 286 (7th Cir.1983). A finding that a corporation is not operated exclusively for charitable purposes cannot be disturbed unless clearly erroneous. *Senior Citizens Stores v. United States,* 602 F.2d at 713.

B. 501(c)(3) Exemption

Section 501(c)(3) of the Internal Revenue Code provides tax exemption for:

> Corporations ... organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational activities ... no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), in any political campaign on behalf of (or in opposition to) any candidate for public office.

To be declared exempt under this section, a corporation must be organized and operated exclusively for one or more exempt purposes. 26 C.F.R. §1.501(c)(3)-1. The treasury regulations set out two tests to determine whether an organization meets this criteria. *Id.* A corporation must first satisfy the "organizational test." To satisfy the organizational test, the "articles of organization"[3] must:

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[3] "[T]he term 'articles of organization' or 'articles' includes the trust instrument, the corporate charter. the articles of association, or any other written instrument by which an organization is created." 26 C.F.R. §1.501(c)(3)-1(b)(v).

> (a) Limit the purposes of such organization to one of more exempt purposes; and
>
> (b) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes. 26 C.F.R. §1.501(c)(3)-1(b). There is no dispute in this instance that Appellant satisfies the organizational test.

Once the organizational test is satisfied, the organization must also show that it satisfies the "operational test." The operational test consists of four elements:

> First, the organization must engage primarily in activities which accomplish one or more of the exempt purposes specified in §501(C)(3). Second, the organization's net earnings may not inure to the benefit of private shareholders or individuals. Third, the organization must not expend a substantial part of its resources attempting to influence legislation or political campaigns. Courts have imposed a fourth element. Organizations seeking exemption from taxes must serve a valid purpose and confer a public benefit.

Church of Scientology v. Commissioner, 823 F.2d 1310, 1315 (9th Cir.1987), cert. denied, 486 U.S. 1015, 108 S.Ct. 1752, 100 L.Ed.2d 214 (1988). Only the first element is in contention in this appeal.

C. Exempt Purpose

An organization must be operated exclusively for an exempt purpose to qualify for exemption under §501(c)(3). "An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose." 26 C.F.R. §1.501(c)(3)-1(c)(1). "[T]he

presence of a single [non-exempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes." *Better Business Bureau v. United States,* 326 U.S. 279, 283, 66 S.Ct. 112, 114, 90 L.Ed. 67 (1945); *Hutchinson Baseball Enter., Inc. v. Commissioner,* 696 F.2d 757, 762 (10th Cir.1982).

Appellant lists its activities, based on percentage of time expended, as follows: "social service, 25%; legal (First Amendment), 20%; TV, broadcasting, 20%; administration, 10%; publishing, 10%; forums, speeches, 5%; classes, training, 5%; and miscellaneous, 5%." The Tax Court found that neither Appellant's social service nor the legal activities (together amounting to 45% of Appellant's activities) qualified as charitable purposes under §501(c)(3).[4] The burden is on the Appellant to prove that it is entitled to the exemption. *See Senior Citizens Stores, Inc. v. United States,* 602 F.2d at 713. Therefore, Appellant had the duty to present, during the administrative process, evidence establishing its exempt status. *See Church of Scientology v. Commissioner,* 823 F.2d at 1317.

1. Social Services

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[4] "The term 'charitable' is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax exempt purposes which may fall within the broad outlines of 'charity' as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments or works; lessening of the burdens of Government; and promotion of social welfare by organization designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; (iv) to combat community deterioration and juvenile delinquency." 26 C.F.R. §1.50(c)(3)-1(d)(2).

Appellant's primary social service is an alleged telephone counseling line. Appellant claims this line is primarily a clearing house for services, which refers callers to "Appropriate government or social service agencies (such as Social Security Administration, Veterans' Department, drug counseling and the like)." The Tax Court found Appellant's explanation of its counseling activities to be insufficient and inconsistent. For example, Appellant submitted two separate documents regarding the number of calls received per month. The first document states the approximate number of calls to be 30, while the second states the approximate number of calls to be in "excess of 100."

Appellant's evidence of its counseling activities consists of a copy from a telephone book listing Appellant's name under the heading of "Community Service Numbers," a one page document entitled "TNM Counseling Guidelines," "recap" (purporting to break down the calls received by type) and Appellant's contention that the majority of calls are fielded by Richard Barrett, "a practicing attorney, with college credits in psychology, education and related fields." Appellant provides no other information as to the training of its counselors, advertising of its services or scope of its counseling. On the record presented, we find that the Tax Court's determination that Appellant's counseling services were not exclusively charitable in nature was not clearly erroneous.

2. Legal Services

Once again, Appellant provided very little information to the IRS regarding its activities. Appellant itself was the interested party in the majority of its litigation. While the precedential value of First Amendment litigation has some collateral benefit which inures to the general public, the primary purpose of the litigation was to advance the interests of the Appellant. On the record presented, we hold that the Tax

Court's finding that Appellant's legal activities were not primarily for charitable purposes was not clearly erroneous.

IV. CONCLUSION

By its own admission, Appellant's social services and legal services jointly comprise approximately 45% of its activities. Having found that neither Appellant's social services nor legal services were primarily for the benefit of the public, the Tax Court properly found as a matter of law that Appellant's non-exempt activities were more than insubstantial.[5] Appellant is therefore not entitled to an I.R.C. §501(c)(3) exemption.

After a thorough review of the record, we conclude that the Tax Court's holding was not clearly erroneous. The decision of the United States Tax Court is AFFIRMED.

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[5] Because Appellant's non-exempt social and legal activities are themselves sufficient to defeat exemption, we need not consider Appellant's contention that the methodology test used to evaluate its educational activities is unconstitutional.

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

THE NATIONALIST MOVEMENT, A MISSISSIPPI NON-PROFIT CORPORATION,	)	
Petitioner	)	Docket No. 10540-91X
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

DECISION

Pursuant to the Opinion of this Court, 102 T.C. No. 22, filed April 11, 1994, it is

DECLARED, ADJUDGED, and DECIDED that petitioner is not qualified as an organization described in Internal Revenue Code Section 501(c)(3), which is exempt from taxation under Section 501(a).

(Signed) L. W. Hamblen, Jr.

L. W. Hamblen, Jr.
Chief Judge

Entered: Apr. 14, 1994